

File

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Denial of Water Quality)	Case No. 3-NC-95-2039
Certification in Regard to the Application of)	
the City of Nekoosa for a Permit to Place Fill)	
in a Wetlands Area, City of Nekoosa, Wood)	
County, Wisconsin		

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 19, 1995, the City of Nekoosa applied to the Department of Natural Resources for water quality certification pursuant to Section 401, Clean Water Act, and Chapter NR 299, Wis. Adm. Code. Certification was requested to fill approximately two acres of wetland along State Highway 173 in the City of Nekoosa. By letter dated September 1, 1995, the Department denied the application. On October 2, 1995, the Department received a request for a contested case hearing pursuant to sec. 227.42, Stats. By letter dated October 11, 1995, the Department granted the request for a contested case hearing pursuant to sec. 227.42, Stats. On December 26, 1995, the Department filed a request for hearing with the Division of Hearings and Appeals.

Pursuant to due notice the Division of Hearings and Appeals conducted a hearing on March 11, 1996, in Wisconsin Rapids, Wisconsin before Mark J. Kaiser, Administrative Law Judge. The parties filed written argument after the hearing. The last submittal was received on April 9, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

City of Nekoosa, by

Peter Lloyd, Attorney
La Chapelle Rushevics & Lloyd
1011 Eighth Street South
Wisconsin Rapids, Wisconsin 54494-5249

Wisconsin Department of Natural Resources, by

Michael D. Scott, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

FINDINGS OF FACT

1. The City of Nekoosa (city or applicant) 951 Market Street, Nekoosa, Wisconsin, filed an application with the Department of Natural Resources (Department) for water quality certification pursuant to sec. 401, Federal Clean Water Act and Chapter NR 299 and 103, Wis. Adm. Code.

2. Water quality certification was sought for filling approximately two acres of wetland. The site is located along the north side of Highway 173 in the City of Nekoosa. The legal description of the site is Government Lot 1, in the SW 1/4, of the NW 1/4 of Section 10, Township 21 North, Range 5 East, City of Nekoosa, Wood County, Wisconsin. The purpose of the proposed project is to develop the site for a fast food restaurant.

3. The site of the proposed project is part of a wetlands approximately fifteen to twenty acres in size. The area exhibits wetland characteristics including the presence of hydric soils, the presence of obligate wetland vegetation, surface water and an intermittent stream.

4. By letter dated September 1, 1995, the Department denied the application. The stated grounds for denial were that the proposed activity is not wetland dependant; and a practicable alternative exists which will not adversely impact wetlands and will not result in other significant adverse environmental consequences. The alternative identified by the Department is locating a restaurant on other upland property. The Department also determined that the proposed activity will cause significant adverse impacts to wetland functional values.

5. The site of the proposed project was donated to the city by the Georgia Pacific Paper Company. The paper company intended to use the lot to expand an existing parking lot. When the paper company was advised by the Department it would not be allowed to fill the wetlands for construction of a parking lot it donated the land to the city.

6. The subject wetlands contain significant floral diversity. Witnesses for the Department listed more than twenty plant species observed on the parcel. Observed plants included Sandbar Willow, Beggars Tick, Smartweed, Blue Vervain, Cattail, numerous species of sedges and, scattered Aspen and Cottonwood trees along the marsh fringe and on upland islands in the marsh proper. Filling the wetlands would destroy the floral diversity function in at least the portion of the wetland which was filled.

7. The subject wetlands provides habitat for wildlife including songbirds, amphibians, reptiles and small mammals. Filling the wetlands would destroy the wildlife habitat functions of the subject wetlands for at least the portion of the wetlands which was filled.

8. The subject wetlands serve important functions in flood control as a storm water detention pond and in maintaining water quality by filtering runoff water. Evidence in the record indicates that most of the runoff water in this area of the city drains through this wetlands and then passes beneath Market Street to the south. The proposed project would reduce the flood control function and runoff filtering function of the wetlands. Wetland areas along the north, east and west sides of this site have been filled over the years. The amount of wetlands in the area which have already been filled makes the remaining wetlands even more valuable.

9 Construction of a fast food restaurant is not a wetlands dependent activity.

10. Practicable alternatives to filling the wetlands exist. Witnesses for the Department identified at least five other sites within the City of Nekoosa which apparently meet the minimum requirements for a *Dairy Queen/Brazier* franchise and will not result in other significant adverse environmental consequences. The minimum requirements for a *Dairy Queen/Brazier* franchise are a lot approximately 30,000 square feet in size with 135 feet of street frontage and location on a main street.

Two of the suggested sites are owned by the city. Use of these sites would involve the relocation of recreational facilities. The other sites are privately owned. These sites would be more costly than the proposed site. The sites would be more costly in terms of either purchase price or development (sewer and water hookup). Although the other sites would be more costly to acquire, the record contains no evidence that any of the sites would be economically unfeasible for use as a fast food restaurant.¹

11. Alternative sites, although considered less desirable by the applicant, are available in the city. Additionally, the city would like to develop the subject site because this lot currently is not taxable. As noted above this lot was given to the city by the Georgia Pacific Paper Company after the paper company was denied permission to fill the wetlands for construction of a parking lot. Allowing the city to now fill the wetlands and develop the site would constitute a windfall for the city.

12. The proposed project will result in significant adverse impacts to the functional values of the affected wetlands and significant adverse impacts to water quality.

13. The area affected is not an area of special natural resource interest within the meaning of sec. NR 103.04, Wis. Adm. Code.

¹Exhibit 4 is material provided by *Dairy Queen/Brazier* to prospective franchisees. This material estimates development costs for a typical *Dairy Queen/Brazier* at between \$25,000 and \$250,000 for land and between \$30,000 and \$75,000 for site improvement. All the potential sites are surely well within these estimates.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification cases pursuant to sec. 227 43(1)(b), Stats., and sec. NR 299.05(b), Wis. Adm. Code.

2. Pursuant to sec. NR 103.06(1)(b), Wis. Adm. Code, the provisions of Chapter NR 103, Wis. Adm. Code, are applicable to water quality certification under Chapter NR 299, Wis. Adm. Code.

3. The project site is a "wetlands" within the definition set forth at sec. NR 103.02(5), Wis. Adm. Code.

4. Construction of a fast food restaurant is not a wetlands dependent activity within the meaning of sec. NR 103.07(2), Wis. Adm. Code, because fast food restaurants are not of a nature that requires location in or adjacent to surface waters or wetlands to fulfil its basic purpose. Practicable alternatives exist for construction of a fast food restaurant in the City of Nekoosa which will not adversely affect wetlands and will not result in other significant adverse environmental consequences. Sec. NR 103.08(4)(a), Wis. Adm. Code, requires a finding that the requirements of Chapter NR 103, Wis. Adm. Code, are not satisfied if an activity is not wetlands dependent and a practicable alternative exists which will not adversely impact wetlands and will not result in other significant adverse environmental consequences.

5. The Division of Hearings and Appeals has the authority pursuant to sec. NR 299.05, Wis. Adm. Code, to deny, approve or modify a water quality certification if it determines that there is a reasonable assurance that the project will comply with standards enumerated in sec. NR 299.04, Wis. Adm. Code. The applicant has not shown that the project will comply with these standards.

ORDER

IT IS THEREFORE ORDERED that the decision of the Department to deny the application of the City of Nekoosa for water quality certification for the purpose of depositing fill in a wetlands is affirmed.

Dated at Madison, Wisconsin on May 13, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By Mark Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.